

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

UNITED STATES OF AMERICA and  
THE STATE OF ILLINOIS,  
ex rel. ALAN J. LITWILLER,  
Plaintiff,

v.

OMNICARE, INC.,  
Defendant.

Civil Action No: 1:11-cv-08980

Hon. Robert M. Dow, Jr.

**OMNICARE, INC.'S MOTION TO DISMISS RELATOR'S COMPLAINT**

Defendant Omnicare, Inc. ("Omnicare") by and through its undersigned counsel respectfully moves to dismiss Relator's Complaint dated December 19, 2011 ("Complaint") pursuant to Federal Rules of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, 12(b)(6), for failure to state a claim upon which relief can be granted, and 9(b), for failure to plead fraud with particularity. Omnicare submits the accompanying Memorandum of Law in Support of its Motion to Dismiss Relator's Complaint ("Memorandum"). In support of this motion, Omnicare states as follows:

1. Plaintiff Alan J. Litwiller ("Relator") filed his Complaint on December 19, 2011 on behalf of himself, the United States, and the State of Illinois, purporting to bring claims for violations of the federal False Claims Act ("FCA"), the Illinois False Claims Act ("IFCA"), and the Illinois Insurance Claims Fraud Prevention Act ("IFCPA").

2. As explained in the accompanying Memorandum, Relator's Complaint is legally deficient for several independent reasons and should be dismissed.

3. The Court lacks jurisdiction over certain of Relator's claims based on the FCA's first-to-file and public disclosure provisions, which bar *qui tam* actions based on allegations that

are the subject of an already pending lawsuit or were publicly disclosed prior to the filing of the complaint. As set forth in Omnicare's Memorandum, certain of Relator's allegations are the subject of a pending lawsuit in the Southern District of Texas, and are therefore barred.

Similarly, other of Relator's allegations were publicly disclosed through an investigation by the Department of Justice and a prior lawsuit, and because Relator does not qualify as an original source of the allegations, those claims are also barred.

4. Furthermore, Relator has failed to state a claim upon which relief can be granted under the FCA because he has not adequately alleged a violation of the anti-kickback laws. Because Relator's allegations do not amount to unlawful remuneration, there is no basis on which he can establish liability under the FCA and all of his claims should be dismissed.

5. Finally, Relator's fraud claims are not pled with the particularity required by Federal Rule of Civil Procedure 9(b). Relator has failed to identify even a single example of any false claims that he alleges Omnicare submitted or caused to be submitted, as required by the Seventh Circuit. Relator also does not plead his allegations of unlawful remuneration with the requisite particularity. For these reasons, Relator's Complaint should be dismissed in its entirety.

WHEREFORE, for the reasons stated above and explained in detail in Omnicare's Memorandum, Omnicare hereby respectfully requests that the Court dismiss Plaintiff's Complaint with prejudice.

Dated: September 16, 2013

Respectfully submitted  
*Counsel for Defendant Omnicare, Inc.*

/s/

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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 16th day of September, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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